No. 16357

In the

United States Court of Appeals

For the Ninth Circuit

JOHN N. SEAVER, JR., *Appellant*

vs.

UNITED STATES PLYWOOD CORPORATION, *Appellee,*

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

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INTRODUCTION

Appellee's basic argument throughout its Brief proceeds on the assumption that this court is restricted by Rule 52a of the Federal Rules of Civil Procedure in reviewing the trial court's findings of fact, as appellee asserts that there is evidence to support the disputed findings.

Appellant readily concedes that if there is substantial evidence to support the trial court's findings, this court must affirm. However, we have demonstrated, and appellee has shown nothing to the contrary, that there was *no* evidence to support the findings in this case which were adverse to appellant.

PROPOSITION I

There is no evidence that the second growth timber on appellant's property was merchantable on May 4, 1942.

AUTHORITIES

Dahl v. Crain, 193 Or 207, 237 P2d 939

Doherty et ux v. Harris Pine Mills, Inc., 211 Or 378, 315 P2d 566

ARGUMENT

a) *The law.* Appellee apparently agrees with appellant's demonstration that under the law of Oregon "merchantable timber" means "timber which has a commercial value in the locality." However, it then argues that the term is ambiguous so as to permit parol evidence to vary this well understood meaning.

A casual reading of the Oregon authorities, including the very cases cited and quoted from by appellee (Br 8-12), shows that the definition is not ambiguous, but it is a question of fact in any case as to whether spe-

cific trees in issue are "merchantable timber," i.e., whether they have a commercial value. The Supreme Court clearly expressed this in the case of *Dahl v. Crain*, 193 Or 207, 237 P2d 939, where it said:

> "'* * * What may be "merchantable timber" at one time or place may not be deemed such at another time or place. In determining what is covered by the term at a particular time and in a particular locality many factors are considered. Size and quality are of prime importance. Location, accessibility, demand, and market conditions are regarded. We do not assume to enumerate all the elements involved in the term. * * *' "

Because of this rule of law, appellant admits it is a question of fact as to whether the second growth trees on appellant's property were merchantable, i.e., had a commercial value, on May 4, 1942.

Basically, this is no different from any case where quality or condition of property is in issue. "U.S. Grade AA" eggs is clear and unambiguous and means eggs which meet the standards of the applicable government regulations. The parties to a contract concerning such eggs would certainly not be permitted to claim that the words mean Grade B eggs or any other eggs except Grade AA. However, it would be a question of fact as to whether a given case of eggs was Grade AA, and that would be a subject for expert testimony by persons

who knew the difference between such eggs and other kinds.

Likewise, in this case, evidence was necessary and admissible to show whether the second growth timber on appellant's property was "merchantable timber" on May 4, 1942. This testimony would be directed to the quality of the timber and not the meaning of the words, "merchantable timber".

As pointed out in Appellant's Brief (page 56), the Oregon Supreme Court has said, in *Doherty et ux v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566:

> "Considered alone this paragraph [merchantable timber] would appear to be clear and unambiguous * * *"

The authorities refute appellee's argument that parol evidence of the alleged "actual intent" of the original parties to the contract was admissible to show these words to mean something else. As a matter of law, it was not. See Appellant's Brief, page 55 et seq.

This is apparently tacitly conceded by appellee, because in its Brief (page 21), it makes the weak contention that even though it might be error to have admitted the testimony to the effect that Warlick thought "merchantable timber" meant "all timber," this would not be necessarily reversible error.

Therefore, the basic issue between appellant and appellee remains as to whether there was any evidence that *this* timber was merchantable. *There was no such evidence.*

b) *The evidence of merchantability.* Appellee argues (Br 17-21) that because there was evidence that second growth timber, as such, was used in Lane County in 1942, this constitutes substantial evidence that the second growth timber on appellant's property was merchantable on that date. This does not constitute a scintilla of evidence to that effect. As pointed out above, the Supreme Court of Oregon said, in the case of *Dahl v. Crain*, 193 Or 207, 237 P2d 939

> " '* * * What may be "merchantable timber" at one time or place may not be deemed such at another time or place. In determining what is covered by the term at a particular time and in a particular locality many factors are considered. Size and quality are of prime importance. Location, accessibility, demand, and market conditions are regarded. We do not assume to enumerate all the elements involved in the term. * * *' "

As demonstrated in Appellant's Brief (pages 31-40), all of the competent evidence on the basic fact in issue in this case, i.e., whether the second growth timber on appellant's property was merchantable on May 4, 1942,

is that the second growth was *not* merchantable. Since there is no evidence that it was, the trial court must be reversed. In so reversing the trial court, this court will be giving full effect to Rule 52a, since a judgment cannot be supported by findings which are "clearly erroneous."

c) *Conduct of the parties.* Appellee argues (Br 15-17) that the conduct of the parties shows that everyone knew that "merchantable timber" was supposed to mean "all timber." As a matter of fact, the actual conduct of the parties, and particularly the conduct of appellee and its predecessor, conclusively shows that appellee and its predecessor knew that they had not acquired title to the second growth timber. This fact appears from documentary evidence and is not in any way dependent upon the testimony of witnesses or the trial court's appraisal of the witnesses. These facts of "practical construction of the contract," to use appellee's words, are:

1. *The Hooker cruise* (R 274). Hooker made this cruise at the request of appellee's predecessor and reported there were "about 5,000,000 feet of timber" (R 275). This would have been a fairly accurate cruise of the old growth, but would have been about 100% off if it had included the second growth. The only possible conclusion from this fact is that appellee's prede-

cessor was not buying the second growth and asked Hooker to report to it how much old growth was on the property.

2. *The depletion records.* Appellee's predecessor set up its depletion records based on the Hooker cruise (Exs. 18A-18B). Since the Hooker cruise was fairly accurate as to the old growth, this shows that appellee's predecessor was operating on the assumption that it only owned the old growth.

3. *The removal affidavits.* Appellee's predecessor, after it had cut nearly all of the old growth, admittedly filed the removal affidavits. As pointed out in Appellant's Brief (page 41), it advised the county assessor in January of 1951:

> "* * * all timber has been removed from the reported lands * * *."

The testimony of no witness nor the trial judge's opinion of him can change these basic facts, and the only conclusion to be reached is that appellee knew it had removed all the timber it owned when it filed the affidavits.

4. *The manner of logging and price of timber.* Before 1953, appellee cut and removed nearly all of the old growth and very little of the second growth. See

Appellant's Brief (pages 38-39). This again demonstrates that it knew what it was doing and only went back and cut the second growth after a fantastic rise in its value of over 400% from 1950.

(The evidence is that good second growth was worth $1.25 per thousand in 1940, if it was close to a public road (R 332).)

Based upon all of this evidence, it is clear that the "practical construction" appellee urges is against its position and completely in favor of appellant. The axiom, "Actions speak louder than words," is particularly apt to apply to these facts. Appellee and its predecessor knew at all times they did not own the second growth, and their conduct conclusively demonstrates this belief.

PROPOSITION II

Appellant did not consent to the removal of the second growth after 1952.

AUTHORITIES

Schiffman v. Hickey, et ux, 101 Or 596, 200 Pac 1035

ARGUMENT

We will not repeat appellant's argument appearing in his Brief (pages 53-55) here.

However, the facts are that appellant did not know that appellee and its predecessor had wrongfully cut his timber until after it was cut and he consulted his attorney. In support of its contention of consent, appellee cites the case of *Schiffman v. Hickey, et ux*, 101 Or 596, 200 Pac 1035. In this case it appeared as an undisputed fact that the plantiff had had a survey of the property made, and after he knew the defendant was pasturing cattle on his land, he continued to permit defendant to do so. The court, of course, held that consent was a defense. However, the defendant in that case had complete knowledge of his rights. This is not true in the instant case.

Further, as demonstrated above, appellee did know its rights, and it knew it did not own the second growth timber. There is no evidence that appellee relied in any way upon any alleged consent of appellant, and it cut the timber in complete disregard to appellant's rights.

PROPOSITION III

Appellee is liable for treble damages.

ARGUMENT

Appellee's only contention on this point is that it claims to have acted in good faith and therefore, it says, only double damages may be recovered. We refer the

court to the argument under Proposition II above, where it is conclusively shown that appellee knew what it was doing all the time and knew it did not own the second growth timber. Its logging superintendent, Frank W. McPherson (R 412), testified that in spite of the language of the contract appellee and its predecessor treated this land exactly as if it owned the fee.

The only conclusion that could be made on all of the evidence is that the timber was willfully and intentionally cut and, therefore, appellant is entitled to treble damages. See Appellant's Brief, 46-53.

CONCLUSION

Appellee's Brief has not pointed out any evidence in the record of this case to support the disputed findings. All of the evidence is to the contrary. Consequently, the findings are "clearly erroneous," and a judgment based upon them cannot be permitted to stand. The trial court must be reversed and directed to enter a judgment in favor of appellant for three times the value of the timber removed after January 1, 1953.

Respectfully submitted,

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